

## California State Association of Counties



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December 9, 2008

Commissioner Ross Johnson, Chair, and  
Commissioners Timothy A. Hodson, A. Eugene Huguenin, Jr.,  
Robert Leidigh, and Ray Remy  
California Fair Political Practices Commission  
428 J Street, Suite 800  
Sacramento, CA 95814-2329

Re: Proposed New Regulation: Title 2 Cal. Code Regs., § 18420.1  
Agenda Item 17 (December 11, 2008)

Dear Chairman Johnson and Members of the Commission:

The California State Association of Counties (CSAC) and League of California Cities (League) submit this letter objecting to proposed regulation 18420.1 and requesting that the Commission defer consideration of this issue until after the California Supreme Court rules in *Vargas v. City of Salinas* (S140911). CSAC and the League are grateful to Commission staff for amendments to the proposed regulation that clarify certain implementation issues. However, the revisions do not address the fundamental concerns of CSAC and the League over the timing or the need for this proposal. We therefore continue to raise the objections voiced in our September 2008 letters. We join in the legal arguments raised by the City of Salinas in its recent letters, and add these additional comments for your consideration.<sup>1</sup>

**The Commission Should Defer Consideration Pending the Outcome in *Vargas v. City of Salinas***

In the *Vargas* case, CSAC and the League have asked the Supreme Court to provide a clear, workable structure for local government on the issue of how to inform voters about pending ballot measures without being accused of using public funds for improper campaign purposes. Whatever the Court ultimately rules, the decision will certainly serve as the framework for local governments and this body in considering expenditures related to issues on the ballot.

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<sup>1</sup> The City of Salinas has reviewed the comments provided in this letter, and has informed the author that it joins in the comments as well.

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That being the case, CSAC sees no reason for the Commission to undertake an effort to amend its regulations on this issue now. The Sixth District Appellate Court's *Vargas* opinion mentioned in the staff report as a basis for this new regulation is no longer citable. And if the purpose is to avoid having the Supreme Court cite to section 18225 of Title 2 of the California Code of Regulations in support of the City of Salinas, this Commission is undoubtedly aware that the Court will not consider any future amendments to the regulatory code as part of this case.

Second, if the Commission believes changes in this area are necessary, it would surely want to consider the input of the California Supreme Court on the subject before moving forward. To do so before the case is decided will only cause the Commission to have to revisit these regulations again to ensure the new regulations are consistent with the Court's ruling. Such action wastes not only the resources of this Commission, but also of local governments and other groups with an interest in this topic.

**The Proposed Regulation Does Nothing to Enhance the FPPC's Enforcement Authority Over Local Government Expenditures About Ballot Measures**

At the September hearing on this regulation, the Commission expressed concern over specific examples of expenditures that it perceived as an inappropriate use of public funds. The proposed regulation, however, would not allow the FPPC to take action against these seeming abuses. Therefore CSAC and the League also object to the proposed regulation because it adds confusion to this area of the law without providing the FPPC with any additional tools for dealing with bad actors.

As noted in the staff report, "expenditures" are a broad category of funds paid for political purposes. (Gov. Code § 82025; Regulation 18225.) Expenditures must be reported by persons or groups that qualify as a "committee" under Government Code section 82013 and Regulation 18420. Again, this report is only required of committees as that term is defined.

To qualify as a committee, a city or county would have to make in excess of \$1,000 of "independent expenditures" as that term is defined. Independent expenditures are a subset of expenditures, and are limited to funds paid to expressly advocate or unambiguously urge a particular result on a ballot measure. (Gov. Code § 82031.)

In other words, cities and counties have no reporting responsibilities to the FPPC unless they are expending funds for activities that expressly advocate or unambiguously urge a particular result on a ballot measure. If the activities are not express advocacy, they are not reportable because by definition they are not being made by a "committee." This

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interpretation was confirmed by FPPC staff at the October Interested Persons hearing for the proposed regulation.

Despite the fact that only qualifying committees (i.e., those engaging in express advocacy) have a duty to report, the staff report implies a reporting requirement where there is no express advocacy:

If a governmental agency otherwise qualifies as a committee, Regulation 18225(b) should not be construed to exempt a payment by the agency for communications about a ballot measure from the Act's reporting requirements, *even if the communications avoid express advocacy.*

(Nov. 14, 2008 Staff Report, Pg. 2)(Emphasis added).

However, as detailed above, in order to qualify as a committee, the governmental agency must be making independent expenditures – i.e., those expressly advocating the passage or defeat of a measure. If the agency's communications "avoid express advocacy," the reporting requirements do not apply.

This leaves local government with the question of what this regulation is supposed to do. It does not provide the FPPC with any additional enforcement authority, since the reporting requirements do not apply to non-committees even if a communication is less than fair and impartial. It does not on its face expand reporting requirements to entities other than qualifying committees. What, then, does it accomplish? We are left guessing as to its meaning and purpose, which only adds confusion to this already less than clear area of the law.

#### **The Proposed Regulation is not Necessary to Clarify Government Code section 8314**

The final reason stated in the staff report for the necessity of this regulation is that it will aid in the interpretation of Government Code section 8314. This causes concern for a number of reasons. First, CSAC and the League question whether it is necessary or wise for this Commission to enact regulations intended to reach beyond the jurisdiction of the Political Reform Act.

Second, enforcement of Government Code section 8314 is not an FPPC function. It is instead specifically reserved to the District Attorneys (or the city attorneys in certain cases). (Gov. Code § 8314, subd. (a)(1).) Notably, the District Attorneys have not commented to the Commission during this process. They have not indicated a need for clarity in the FPPC regulations to effectively enforce this provision, nor have they indicated whether the proposed regulation provides clarity or makes the issue more uncertain.

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Finally, Government Code section 8314 specifically states that use of public funds is permitted to provide information about ballot measures so long as the information is otherwise permitted by law and is fair and impartial. (Gov. Code § 8314, subd. (d).) It is not clear in the staff report or the proposed regulation why having that standard repeated again in regulations of an agency with no enforcement authority regarding section 8314 does anything to clarify this point.

### Conclusion


CSAC and the League remain concerned about the timing of this regulation. The Supreme Court will soon address these important issues and give guidance to the Commission and local governments on the limits of expenditures related to ballot measures. The other reasons stated in the staff report as creating a need for this revision are not resolved by the proposal.

On the other hand, adoption of the proposed regulation will:

- Create a new regulation that will almost certainly have to be reviewed again soon to ensure consistency with the Supreme Court's decision in *Vargas*;
- Create practical implementation questions, as noted in the letter submitted by the City of Salinas; and
- Create confusion over the reporting requirements when a local government is not a committee (i.e., does not make "independent expenditures" or those that expressly advocate).

For these reasons, CSAC and the League urge this Commission to defer consideration of this issue until after the California Supreme Court has issued its decision in *Vargas v. City of Salinas*.

Respectfully Submitted,

  
Jennifer B. Henning  
CSAC Litigation Counsel

cc: Patrick Whitnell, General Counsel, League of California Cities  
Vanessa Vallarta, Salinas City Attorney  
Joel Franklin, Counsel for City of Salinas